

**State of California
California Regional Water Quality Control Board
Santa Ana Region**

February 29, 2008

ITEM: *11

SUBJECT: Order No. R8-2008-0026, DBJ Development Corp., Florida
Promenade, Parcel Map No. 35350, City of Hemet

SUMMARY

The matter before the Board is to consider adoption of Order No. R8-2008-0026, authorizing the discharge of fill to waters of the State that have been determined to be outside of the U.S. Army Corps of Engineers' (Corps) jurisdiction and not subject to regulation under Clean Water Act (CWA) Section 404 (non-federal waters). In the event a later determination is made finding that the discharge is subject to Corps' jurisdiction, this Order will also serve as a CWA Section 401 Water Quality Standards Certification.

BACKGROUND

California Water Code (CWC) Section 13376 states that, "any person discharging dredge or fill material or proposing to discharge dredged or fill material into the navigable waters of the United States within the jurisdiction of this state shall file a report of the discharge in compliance with Section 13260." Section 13260(a) of the CWC requires that any person discharging waste or proposing to discharge waste within any region, other than to a community sewer system, that could affect the quality of the waters of the State, file a report of waste discharge (ROWD). Under federal Clean Water Act (CWA) Section 401, every applicant for a federal permit or license for any activity that may result in a discharge to waters of the United States must obtain State Water Quality Certification (Certification) that the proposed activity will comply with state water quality standards.

Most Certifications are issued in connection with U.S. Army Corps of Engineers (Corps) CWA Section 404 permits for dredge and fill discharges. The State Water Resources Control Board (State Board) and Regional Water Quality Control Boards administer the Certification program in accordance with the requirements of California Code of Regulations Title 23, Section 3830 *et seq.* Since November 2003, all Certifications have been issued by the Executive Officer accompanied by authorization to discharge in accordance with State Water Resources Control Board Order No. 2003-0017-DWQ (Order No. 2003-0017-DWQ), "General Waste Discharge Requirements for Dredge and Fill Discharges That Have Received State Water Quality Certification."

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Due to recent decisions by the Supreme Court that increasingly have limited the authority of the Corps to regulate discharges of dredge and fill to waters of the U.S., some projects discharge dredge or fill to waters of the State that are 'non-federal' waters. As a result, these projects are not subject to a CWA Section 404 permit from the Corps and do not require a Certification. In the absence of the need to obtain a Certification, the State Board has asserted the State's authority to regulate discharges of dredge and fill to waters of the State under the Porter-Cologne Water Quality Control Act, codified as California Water Code Division 7.

On May 4, 2004, the State Board issued Water Quality Order No. 2004-0004-DWQ, "Statewide General Waste Discharge Requirements for Dredge and Fill Discharges to Waters Deemed by the U.S. Army Corps of Engineers to be Outside of Federal Jurisdiction (Order No. 2004-0004-DWQ)." However, numeric impact thresholds limit the application of Order No. 2004-0004-DWQ to relatively small discharges of fill.

On November 13, 2007, Board staff received a report of waste discharge (Report) from Glenn Lukos Associates (GLA) on behalf of DBJ Development Corp. In the Report, DBJ Development Corp. proposes to discharge fill to 0.20 acre of waters of the State. The affected waters are two intermittent agricultural drainages but include 0.03 acre of wetlands in two separate patches that support woody riparian and native and non-native wetland plants. All of the wetlands were unintentionally created as the result of nuisance flow from easterly development and/or poor contouring, which resulted in standing water. A total of 1,742 linear feet of drainage will be filled.

The discharges will occur as part of the development of Florida Promenade. Florida Promenade consists of the construction of a 200,000 square-foot retail center on 19 acres located at the northeast corner of Florida Avenue and Myers Street in the City of Hemet. The project will include widening of Florida Avenue (Highway 74) and half-street improvements on Myers Street.

The project site drains to the southwest via culverts under, and occasionally by flooding over, Florida Avenue and Warren Road. West of Warren Road is a large vernal pool complex that is inhabited by various threatened or endangered plants and invertebrates. The project extends the City storm drain system towards the vernal pool complex. The project site is tributary to Salt Creek and Canyon Lake and overlies the Hemet South Groundwater Management Zone.

Hydraulic conditions of concern are present at the vernal pool complex. The extension of City storm drain system has the potential to cause or contribute to erosion of the complex through alteration of the local hydrology, or conversion of the seasonal pools to perennial pools by the conveyance of nuisance flows. These potential impacts are partly addressed through Regional Board Order No. R8-2002-0011, NPDES Permit No. CAS618033, commonly known as the Riverside County Urban Storm Water Runoff Permit, and subsequent renewals,

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as discussed below. In addition, the City of Hemet anticipates addressing these potential impacts through a drainage plan for the area¹.

GLA asserts that none of the waters are subject to regulation by the U.S. Army Corps of Engineers (Corps) under Section 404 of the Clean Water Act because the drainages do not support a "significant nexus" connection to a navigable water pursuant to the U.S. Supreme Court Consolidated Cases titled *Rapanos v. United States* [Rapanos] and *Carabell v. U.S. Army Corps of Engineers* [Carabell]. The Corps has tentatively agreed with GLA's assertion.

As a result of Board staff review of biological reports provided in the report of waste discharge and a site visit conducted on January 25, 2008, Board staff has determined that the existing or potential beneficial uses of the waters affected by the proposed project include warm freshwater habitat (WARM), wildlife habitat (WILD), groundwater recharge (GWR). Board staff has determined that the discharges to the non-federal waters of the State at Florida Promenade would affect beneficial uses of the receiving drainages. However, the Board could not authorize the proposed discharges in accordance with Order No. 2004-0004-DWQ because the discharges exceeded the impact thresholds of that Order. Consequently, the proposed discharge would need to be authorized using individual waste discharge requirements.

DBJ Development Corp. proposes to mitigate impacts to beneficial uses by paying an in-lieu fee to the Santa Ana Watershed Association towards the eradication of 0.40-acre of invasive plant species in riparian waters. Because the wetlands on the site are accidental, Board staff does not believe that the State "no-net-loss policy" should apply. Consequently, Board staff believes that the proposed mitigation is acceptable.

Other discharges that will occur as part of the development of Florida Promenade are construction and post-construction (urban) discharges of storm water runoff. Both discharges are addressed by State Board Water Quality Order No. 99-08-DWQ, "General Permit for Discharges Associated with Construction Activity" (Order No. 99-08-DWQ) and Regional Board Order No. R8-2002-0011, NPDES Permit No. CAS618033, commonly known as the Riverside County Urban Storm Water Runoff Permit, and subsequent renewals. As required under these permits, a Storm Water Pollution Prevention Plan (SWPPP) and a final Water Quality Management Plan (WQMP) will be developed. Typical construction best management practices (BMPs) for erosion control and sediment control devices will be employed to control and remove pollutants in storm water runoff.

¹ To the west of Florida Promenade is the proposed Garrett Ranch commercial development which will also further extend the City's storm drain infrastructure towards the vernal pool complex. The cumulative impacts of the storm drain system will be addressed either through improvements as part of the Garrett Ranch project or through a separate storm drain improvement plan.

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A preliminary WQMP, provided as part of the Report, indicates that three infiltration trenches along Florida Avenue and an underground infiltration gallery in the northwest portion of the site will be used to remove pollutants in discharges from the project. The infiltration gallery will also retain increased storm water runoff from the 100-year storm event. All BMPs are proposed to be maintained by a property owner's association. Additional BMPs will be identified in the SWPPP and final WQMP. The WQMP will be subject to review and approval by the City of Hemet.

Pursuant to CEQA, the City of Hemet prepared a Mitigated Negative Declaration (MND) and adopted it on November 27, 2007. A Notice of Determination was filed on November 30, 2007.

RECOMMENDATION

Board staff recommends that the Board adopt Order No. R8-2008-0026.

Comments were solicited from the following agencies and parties:

U.S. Army Corps of Engineers, Los Angeles District
California Department of Fish and Game
U.S. Fish and Wildlife Service
City of Hemet
U.S. Environmental Protection Agency, Supervisor of the Wetlands Regulatory Office
State Water Resources Control Board, Department of Water Quality, Water Quality Certification Unit

State of California
California Regional Water Quality Control Board
Santa Ana Region

Order No. R8-2008-0026

Waste Discharge Requirements

for

DBJ Development Corp.
Florida Promenade, City of Hemet
Riverside County

The California Regional Water Quality Control Board, Santa Ana Region (hereinafter Board), finds that:

1. DBJ Development Corp. (hereinafter, discharger) proposes to discharge fill to 0.20 acre of intermittent agricultural drainages, including 0.03 acre of wetlands, as part of the development of Florida Promenade, Parcel Map No. 35350 (PM 35350) in the City of Hemet.
2. Florida Promenade consists of the construction of a 200,000 square-foot retail center on 19 acres located at the northeast corner of Florida Avenue and Myers Street in the City of Hemet. The project will include widening of Florida Avenue (Highway 74) and half-street improvements on Myers Street. Florida Promenade is located within Section 7, Township 5 South, Range 1 West, as shown on the U.S. Geological Service *Winchester, California* quadrangle (33 deg. 44 min. 42 sec. N/-117 deg. 01 min. 21 sec. W).
3. The discharger asserts that the drainages proposed for fill are not subject to Clean Water Act Section 404 permits administered by the U.S. Army Corps of Engineers (Corps). The discharger has prepared a functional assessment within the project area and concluded that the affected drainages do not have a "significant nexus" to navigable waters pursuant to the U.S. Supreme Court Cases titled *Rapanos v. United States* [Rapanos] and *Carabell v. U.S. Army Corps of Engineers* [Carabell]. The discharger's assertion has not been verified by Corps staff. This Order will regulate the proposed discharge of fill if a Section 404 permit and Section 401 certification are later determined to be necessary.
4. The Board commonly regulates discharges of dredge or fill to waters of the State through the issuance of Clean Water Act (CWA) Section 401 Water Quality Standards Certifications (Certifications) where the discharge

is also subject to regulation by the Corps. This occurs when the receiving water is both a water of the State as defined by the California Water Code and a water of the U.S. under CWA Section 404. In the absence of an applicable federal permit or license, the Board may regulate the proposed discharge through the issuance of Waste Discharge Requirements or a waiver thereof.

5. The waters of the State on the site consist of two intermittent agricultural drainages overlying the Hemet South Groundwater Management Zone (GMZ).
6. Based on the applicant's biological assessment and a site visit by Board staff on January 25, 2008, beneficial uses that are existing or attainable for the drainages include:
 - a. warm freshwater habitat (WARM);
 - b. wildlife habitat (WILD); and
 - c. groundwater recharge (GWR);
7. Waste Discharge Requirements (WDRs) are necessary to address impacts of the fill on the beneficial uses of waters of the State.
8. This Order regulates the discharge of fill material to waters of the State that may not be considered under Corps CWA Section 404 jurisdiction (non-federal). The discharger submitted a ROWD on November 13, 2007.
9. The discharger has committed to mitigate direct impacts to waters of the State by paying an in-lieu fee to the Santa Ana Watershed Association towards the eradication of 0.40 acre of invasive plant species.
10. Pursuant to CEQA, the City of Hemet adopted a Mitigated Negative Declaration (MND) for Florida Promenade on November 27, 2007. A Notice of Determination was filed on November 30, 2007.
11. As a Responsible Agency under CEQA, the Board is required to consider the Lead Agency's environmental documents and make findings on the significant impacts within its jurisdiction to approve. (Public Resources Code, Section 21002.1(d); California Code of Regulations, Title 14, Section 15096(g), (h).) The Regional Board has considered the MND prepared by the City of Hemet in the adoption of these waste discharge requirements.
12. The Board has considered antidegradation pursuant to State Board Resolution No. 68-16 and finds that the discharge is consistent with those provisions.

13. The Board has notified the discharger and other interested agencies and persons of its intent to prescribe waste discharge requirements for the discharge and has provided them with an opportunity for public hearing and opportunity to submit their written views and recommendations.
14. The Board, in a public meeting, heard and considered all comments pertaining to the discharge.

IT IS HEREBY ORDERED that the discharger, in order to meet the provisions contained in Division 7 of the California Water Code and regulations adopted thereunder, shall comply with the following:

A. DISCHARGE SPECIFICATIONS:

1. No activities associated with the project shall cause or threaten to cause a nuisance or pollution as defined in Section 13050 of the California Water Code.
2. The discharge of any substance in concentrations toxic to animal or plant life is prohibited.
3. The groundwater in the vicinity of the project shall not be degraded as a result of the project activities or placement of fill for the project.
4. The discharge of fill materials shall be limited to inert materials, as defined in Section 20230, Division 2, Title 27. The discharge of fill material other than native soil shall be only with the prior approval of the Executive Officer.

B. DISCHARGE PROHIBITIONS:

1. The direct discharge of wastes, including rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would be eventually transported to surface waters, including flood plains, is prohibited.
2. The discharge of floating oil or other floating materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters is prohibited.
3. The discharge of silt, sand, clay, or other earthen materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity, or discoloration in surface waters is prohibited.

4. Discharges to surface waters of wastes or pollutants that are not otherwise regulated by a separate National Pollutant Elimination System (NPDES) permit, is prohibited.

C. PROVISIONS:

1. The discharger shall pay an in-lieu fee to the Santa Ana Watershed Association towards the eradication of 0.40 acre of invasive plant species in the San Jacinto Watershed. The fee shall include monies for a minimum of six years of follow-on maintenance. Evidence of the payment shall be provided to the Executive Officer by April 29, 2008.
2. The discharge of fill to waters of the State is prohibited until the evidence of payment of the in-lieu fee is received by the Executive Officer.
3. The discharger shall maintain a copy of this Order at the site so that it is available to site operating personnel at all times. Key operating personnel shall be familiar with its content.
4. The discharger shall remove from the site any waste or fill material found to contain substances that may have a deleterious effect on water quality, and dispose of unacceptable wastes in a manner acceptable to the Executive Officer.
5. The discharger must comply with all of the requirements of this Order. Any violation of this Order constitutes a violation of the California Water Code and may constitute a violation of the CWA and its regulations, and is grounds for enforcement action, termination of this Order, revocation and re-issuance of this Order, denial of an application for re-issuance of this Order, or a combination thereof.
6. The discharger shall take all reasonable steps to minimize or prevent any discharge that has a reasonable likelihood of adversely affecting human health or the environment.
7. The provisions of this Order are severable, and if any provision of this Order, or the application of any provisions of this Order to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this Order shall not be affected thereby.
8. The filing of a request by the discharger for modification, revocation and re-issuance, or termination of this Order or a notification of planned changes or anticipated noncompliance does not stay any requirements of this Order.

9. The requirements prescribed herein do not authorize the commission of any act causing injury to the property of another, nor protect the discharger from liabilities under federal, state, or local laws, nor guarantee the discharger a capacity right in the receiving waters.
10. This Order does not convey any property rights of any sort, or any exclusive privilege.
11. This Order is not transferable to any person except after notice to, and approval by, the Executive Officer. The Board may require modification or revocation and re-issuance of this Order to change the name of the discharger.
12. In the event of any change in control or ownership of land or waste discharge facility presently owned or controlled by the discharger, the discharger shall notify the succeeding owner or operator of the existence of this Order by letter, a copy of which shall be forwarded to the Board.
13. This Order will serve as a Clean Water Act Section 401 Water Quality Standards Certification in the event that one is required by any federal agency, except as noted below. Under California Water Code, Section 1058, and Pursuant to 23 CCR §3860, the following shall be included as conditions of all water quality certification actions:
 - a. Every certification action is subject to modification or revocation upon administrative or judicial review, including review and amendment pursuant to Section §13330 of the Water Code and Article 6 (commencing with Section 3867) of this Chapter.
 - b. Certification is not intended and shall not be construed to apply to any activity involving a hydroelectric facility and requiring a FERC license or an amendment to a FERC license unless the pertinent certification application was filed pursuant to Subsection §3855(b) of this Chapter and that application specifically identified that a FERC license or amendment to a FERC license for a hydroelectric facility was being sought.
 - c. Certification is conditioned upon total payment of any fee required under this Chapter and owed by the applicant.
14. The Board and other authorized representatives shall be allowed:
 - a. Entry upon premises where a regulated facility or activity is located or conducted, or where records are kept under the requirements of this Order;

- b. Access to copy any records that are kept under the requirements of this Order;
- c. To inspect any facility, equipment (including monitoring and control equipment), practices, or operations regulated or required under this Order; and
- d. To photograph, sample and monitor for the purpose of assuring compliance with this Order.

I, Gerard J. Thibeault, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Santa Ana Region, on February 29, 2008.

Gerard J. Thibeault
Executive Officer